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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1967.

No. 944

CITY OF EAST ST. LOUIS,
Respondent,

vs.

UNION ELECTRIC COMPANY, a Corporation,
Petitioner.

PETITION FOR A WRIT OF CERTIORARI

To the Supreme Court of Illinois.

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INDEX.

	Page
Prayer	1
Reports of Opinions Below	2
Grounds on Which Jurisdiction is Invoked	2
Questions Presented for Review	2
Constitutional Provisions, Ordinances and Statutes Involved	5
Statement of the Case	8
Argument and Reasons for the Allowance of the Writ	12
The Effect of the Opinion Below	20
Appendices	A-1

Table of Cases.

Appleby v. New York, 271 U. S. 364, 46 S. Ct. 569, 70 L. ed. 992	13
Brinkerhoff-Faris Trust & Sav. Co. v. Hill, 281 U. S. 673, 50 S. Ct. 451, 74 L. ed. 1107	16
City of East St. Louis v. Union Electric Company, 37 Ill. 2d 537, 229 N. E. 2d 522	2,10
Cleveland v. Cleveland City R. Co., 194 U. S. 517, 24 S. Ct. 756, 48 L. ed. 1102	14
Connolly v. Union Sewer Pipe Company, 184 U. S. 540, 22 S. Ct. 431, 46 L. ed. 679	18
Dartmouth College v. Woodward, 4 Wheat. 518, 4 L. ed. 665	15, 20
Detroit United Railway v. Michigan, 242 U. S. 238, 37 S. Ct. 87, 61 L. ed. 268	13
Duluth & Iron Range Railroad v. County of St. Louis, 179 U. S. 302, 21 S. Ct. 124, 45 L. ed. 201	16
First Nat. Bank v. Weld County, 264 U. S. 450, 44 S. Ct. 385, 68 L. ed. 784	16
Florida Cent. R. R. Co. v. Schutte, 103 U. S. 118, 13 Otto 118, 26 L. ed. 327	15, 19
Hamilton Gaslight & Coke Co. v. City of Hamilton, 146 U. S. 258, 13 S. Ct. 90, 36 L. ed. 963	13
Hartford S. B. I. & Ins. Co. v. Harrison, 301 U. S.	

459, 57 S. Ct. 838, 81 L. ed. 1223 18
Louisville Gas & E. Co. v. Coleman, 277 U. S. 32, 48 S. Ct. 423, 72 L. ed. 770 18
Mercantile Trust & Deposit Company of Baltimore v. City of Columbus, 203 U. S. 311, 27 S. Ct. 83, 51 L. ed. 198 13
Minneapolis v. Minneapolis Street R. Co., 215 U. S. 417, 30 S. Ct. 118, 54 L. ed. 259 13
Nat. Bank of Hyde Park v. Isaacs, 27 Ill. 2d 205, 188 N. E. 2d 704 17
People ex rel. Hafer v. Flynn, 13 Ill. 2d 368, 150 N. E. 2d 183 19
Springfield v. Inter-State Tel. Co., 279 Ill. 324, 116 N. E. 631 12
Stearns v. Minnesota ex rel. Marr, 179 U. S. 223, 21 S. Ct. 73, 45 L. ed. 162 16
Tews v. Woodhiser, 352 Ill. 212, 185 N. E. 827 15
Village of West City v. Telephone Co., 372 Ill. 493, 24 N. E. 2d 352 12
Winter v. Barrett, 352 Ill. 441, 186 N. E. 113 .....4, 17

Constitutions, Statutes and Ordinances Cited.

U. S. Const., art. I, § 10 .....5, 15
U. S. Const., amend. V 5
U. S. Const., amend. XIV, § 1 5
Ill. Const., art. IX 16
28 U. S. C., § 1257 (3) 2
Ill. Rev. Stat., 1933, ch. 120, § 441 ..... 4, 6
Ill. Rev. Stat., 1965, ch. 24, § 8-11-2 .....6, 16
Ill. Rev. Stat., 1965, ch. 111⅔, § 36 (a) 7, 16
East St. Louis, Ill., Ordinance 3193 .....8, 12
East St. Louis, Ill., Ordinance 3698 .....8, 12

Texts Cited.

62 C. J. S., Municipal Corporations, § 442 18
Illinois Law and Practice, Cities and Villages, § 151, p. 465 15

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PETITION FOR A WRIT OF CERTIORARI

To the Supreme Court of Illinois.

Petitioner, Union Electric Company, a corporation, petitions the Supreme Court of the United States to issue its Writ of Certiorari to review the final judgment of the Supreme Court of Illinois in the cause entitled "City of East St. Louis, Plaintiff-Appellee v. Union Electric Company, Defendant-Appellant" and numbered 40178 in that court, which affirmed the judgment of the Circuit Court for the Twentieth Judicial Circuit of Illinois, St. Clair County, adjudging and declaring that contrary to the express terms of a franchise ordinance, petitioner was obliged to make payments to respondent under the terms of such franchise ordinance without consideration of taxes paid by petitioner to respondent under an ordinance enacted by respondent subsequent to the franchise ordinance. The judgment of the Supreme Court of Illinois became final on September 27, 1967, when that court modified its prior opinion and denied petition for rehearing.

REPORTS OF OPINIONS BELOW.

The opinion and judgment of the Supreme Court of Illinois were filed on May 18, 1967 and the opinion as modified on September 27, 1967, is reported in 37 Ill. 2d 537, 229 N. E. 2d 522. A copy of this opinion, together with a copy of the unreported opinion of the Circuit Court are appended hereto. Rehearing was denied on September 27, 1967.

GROUNDS ON WHICH JURISDICTION IS INVOKED.

(i) The date of the judgment of the Supreme Court of Illinois sought to be reviewed is May 18, 1967. It was entered on that day.

(ii) Petition for Rehearing was denied by the Supreme Court of Illinois on September 27, 1967.

(iii) The statute conferring jurisdiction on this Court to review the judgment of the Supreme Court of Illinois by Writ of Certiorari is U. S. C., Title 28, Section 1257 (3).

QUESTIONS PRESENTED FOR REVIEW.

The suit is one for declaratory judgment. The City sued for a judgment declaring that the Company was obligated for payments which it had not made under a franchise contract expressed in an ordinance enacted by the City and accepted by the Company in 1948. The franchise ordinance provided that the Company's annual payments should be a stated percentage of its gross revenues from sales of electricity as exceeded the aggregate amount of all payments for taxes imposed by ordinance and which the Company annually paid or became liable to pay to the City. The City enacted an ordinance in 1960 under which for that year and each succeeding year the Com-

pany paid taxes to the City in an amount exceeding the percentage of revenues specified in the franchise ordinance. The Company, accordingly, made no payments under the franchise ordinance either in 1960 or in any following year. The trial court found and declared the Company to be liable for franchise payments for 1960 and thereafter, and the Supreme Court of Illinois affirmed.

The questions presented for review are:

(1) Where a contract between the City and Company, expressed in a franchise ordinance, clearly and explicitly provided that the Company's payments to the City should be only that stated percentage of the Company's gross revenues derived from the sale of electric energy "as shall exceed"

> "(b) the aggregate amount of all payments made by Company to the City of East St. Louis or which accrued and for which Company became liable for any . . . taxes . . . imposed by any valid ordinance of the City . . ."

may the City enact a subsequent ordinance under which the Company paid taxes to the City in excess of the payments provided for in the franchise ordinance and at the same time collect payments under the franchise ordinance without unconstitutionally impairing the obligation of the franchise contract in violation of Article I, Section 10 of the Constitution of the United States?

(2) When the Company and City admitted in their pleadings and stipulated of record that the Company paid taxes to the City under an ordinance enacted subsequent to the franchise ordinance and that such taxes so paid exceeded the percentage of gross revenues as specified in the franchise ordinance, may the Supreme Court of Illinois disregard such admitted and stipulated facts and find that the Company paid no such taxes, without depriving the Company of its property without due process in con-

travention of the Fifth and Fourteenth Amendments to the Constitution of the United States?

(3) Can the Supreme Court of Illinois hold as in **Winter v. Barrett**, 352 Ill. 441, 457, 186 N. E. 113, that a tax imposed under an Illinois statute entitled, "An Act in relation to a tax upon persons engaged in the business of selling tangible personal property to purchasers for use or consumption", Ill. Rev. Stats., 1933, Ch. 120, § 441:

> ". . . is not a tax on purchasers of property but is a tax on persons engaged in the business of selling tangible personal property at retail—an occupation tax, . . ."

and then find that a tax authorized by statute and imposed by municipal ordinance upon a company engaged in selling electricity for use and consumption is a tax on the purchasers of such electricity and not upon the company without denying equal protection of the laws to the company in violation of the Fourteenth Amendment to the Constitution of the United States?

(4) May the Supreme Court of Illinois properly refuse to accept the plain and unambiguous language of a franchise contract, and because of its stated dissatisfaction with the result thereof, modify or amend such contract under the guise of construing it and then in so doing determine only "the intent of the law making body" rather than the intent of both parties to such contract as such intent appears from the language of the contract when such language is given its usual and ordinary meaning?

THE CONSTITUTIONAL PROVISIONS, ORDINANCES AND STATUTES INVOLVED.

Article I, Section 10, of the Constitution of the United States and the Fifth and Section 1 of the Fourteenth Amendments thereto are involved:

Article I, Section 10.

"No State shall enter any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility."

Amendment V.

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger, nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Amendment XIV, Section 1.

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizer of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, with-

out due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Franchise Ordinance No. 3197 and Utility Tax Ordinance No. 3698, enacted by the City of East St. Louis in 1948 and 1960 respectively, are involved. The provisions of both ordinances are lengthy and are included in the appendix (A-16 and A-22). The following provisions of statutes of the State of Illinois are also applicable:

Ill. Rev. Stat. 1965, Ch. 24, § 8-11-2 (Municipal Code):

"Taxation of Occupations or privileges. The corporate authorities of any municipality may tax any or all of the following occupations or privileges: . . .

"3. Persons engaged in the business of distributing, supplying, furnishing, or selling electricity for use or consumption within the corporate limits of the municipality, and not for resale, at a rate not to exceed 5% of the gross receipts therefrom. . . .

"Any of the taxes enumerated in this section may be in addition to the payment of money, or value of products or services furnished to the municipality by the taxpayer as compensation for the use of its streets, alleys, or other public places, or installation and maintenance therein, thereon or thereunder of poles, wires, pipes or other equipment used in the operation of the taxpayer's business."

Ill. Rev. Stats. 1933, Ch. 120, § 441 (Revenue Act):

"§ 2. A tax is imposed upon persons engaged in the business of selling tangible personal property at retail in this State at the rate of two per cent (2%) of the gross receipts from such sales in this State of tangible personal property made in the course of such business upon and after taking effect of this Act and prior to July 1, 1935. However such tax is not imposed upon the privilege of engaging in any business in interstate commerce or otherwise, which business may not, under the Constitution and statutes of the United States, be made the subject of taxation by this State."

Ill. Rev. Stats. 1965, Ch. 111⅔, § 36 (a) (Public Utilities Act):

"(a) Whenever a municipality pursuant to Section 8-11-2 of the Illinois Municipal Code, as heretofore and hereafter amended, imposes a tax on any public utility, such utility may charge its customers, in addition to any rate authorized by this Act, an additional charge equal to the sum of (1) an amount equal to such municipal tax, or any part thereof, (2) 3% of such tax, or any part thereof, as the case may be, to cover costs of accounting, and (3) an amount equal to the increase in taxes and other payments to governmental bodies resulting from the amount of such additional charge. Such utility shall file with the Commission a true and correct copy of the municipal ordinance imposing such tax; and also shall file with the Commission a supplemental schedule applicable to such municipality which shall specify such additional charge and which shall become effective upon filing without further notice. Such additional charge shall be made by the addition of a uniform percentage to the amounts payable for intrastate utility service in such municipality and shall be shown separately on the utility bill to each customer. The Commission shall have power to investigate whether or not such supplemental schedule correctly specifies such additional charge, but shall have no power to suspend such supplemental schedule. If the Commission finds, after a hearing, that such supplemental schedule does not correctly specify such additional charge, it shall by order require a refund to the appropriate customers of the excess, if any, with interest, in such manner as it shall deem just and reasonable, and in and by such order shall require the utility to file an amended supplemental schedule corresponding to the finding and order of the Commission."

STATEMENT OF THE CASE.

The case was presented on the complaint, the verified answer and a stipulation of facts. No testimony was offered. The stipulation, with copies of the franchise and utility tax ordinances attached, is appended (App. C, p. A-13).

Union Electric Company, a public utility, furnishes electric service in the City of East St. Louis, Illinois. The Company and City negotiated a franchise contract in 1948 which became effective when the City enacted Franchise Ordinance No. 3193 and the Company accepted such ordinance. The ordinance specified certain initial payments which the Company made and then provided that for each calendar year after 1949 the Company should pay to the City an amount, if any, by which a stated percentage of the Company's gross revenues from sale of electric energy in the City exceeded

> "(b) the aggregate amount of all payments made by Company to the City of East St. Louis, or which accrued and for which Company became liable, during the preceding calendar year, for or on account of permit and inspection fees, or any other fees, licenses, charges, taxes or other exactions of whatsoever kind or character not in derogation of the rights, franchise, permission and authority hereby granted (except general taxes on tangible property) imposed by any valid ordinance of the City of East St. Louis."

The Company made franchise payments to the City until 1960 when the City enacted Utility Tax Ordinance No. 3698. Sections 1 and 1 (c) of this ordinance imposed a tax upon the Company. They provided:

> "A tax is imposed on all persons engaged in the following occupations or privileges: . . .

> "c. Persons engaged in the business of distributing, supplying, furnishing, or selling electricity for use or consumption within the corporate limits of the City of East St. Louis, Illinois, and not for resale, at the rate of 4.48% of the gross receipts therefrom."

The Company paid the City the utility tax which in 1960 and annually thereafter exceeded the amount of the percentage of gross revenues specified in the franchise ordinance. The Company, accordingly, commencing in 1960, discontinued its franchise payments.

Three years later the City sued for a declaratory judgment that the Company was obligated for franchise payments notwithstanding the contractual provisions of the franchise ordinance and the Company's payment of the utility tax. The Company's answer filed in the trial court on February 10, 1964, to the City's complaint alleged that the declaration which the City asked would impair (Rec. 25):

> ". . . the obligation of the contract existing between plaintiff and defendant, the terms and provisions of which are set forth in Ordinance No. 3193, in violation of the provisions of the Constitution of the United States and Section 10 of Article I thereof . . ."

The Company urged this constitutional question in a memorandum filed with the trial court on February 5, 1965, in which it asked the court to find (Rec. 65):

> " 'the construction of and the effect which the City asks this Court to give to the provisions of the Utility Tax Ordinance would cause such ordinance and its terms and conditions as so construed to be a law or ordinance impairing the obligation of the contract existing between Union Electric Company and the City, the terms of which are set forth in

> the Franchise Ordinance in violation of Section 10 of Article I of the Constitution of the United States . . .' "

and cited authorities in support of this request (Rec. 65-71). The Company reurged the constitutional question in its motion to vacate and set aside the trial court's order and judgment of September 14, 1965 (Rec. 41-43). The trial court denied this motion on June 13, 1966 and decided the constitutional question contrary to the Company's contention (Rec. 29).

The constitutional question was presented to the Supreme Court of Illinois by the Company's brief filed there. The Company requested the Supreme Court to hold,

> "The trial court's declaration that defendant's tax payments under the Utility Tax Ordinance shall not be considered in determining defendant's obligation for payments under the Franchise Ordinance unconstitutionally impairs the obligation of contract under the Franchise Ordinance" (Rec. Index 2, p. 16),

and devoted ten pages of a twenty-eight page brief to such constitutional question (Rec. Index 2, pp. 16-26). The Supreme Court of Illinois decided this question, 37 Ill. 2d 537, 544:

> "It is apparent from what we have said that we deem that the argument of the Company that the utility tax ordinance unconstitutionally impairs the obligation of contract between it and the City is without merit."

The trial court limited its determination to finding that "because of the intent of the parties and the wording and phrasing of the Franchise Ordinance" the taxes which the Company paid to the City under the utility tax ordinance did not constitute a "tax or taxes within the mean-

ing of Section 6, Paragraph B of the Franchise Ordinance" (App. p. A-12). The constitutional questions of due process and equal protection of the laws entered the case when the Supreme Court of Illinois held, contrary to stipulated fact, that the Company had not paid the utility tax to the City and that such tax was imposed on the consumer rather than on the Company.

ARGUMENT AND REASONS FOR THE ALLOWANCE OF THE WRIT.

1) The franchise ordinance No. 3193 on acceptance by the Company in 1948 became a contract binding upon the City and Company. Its terms could not be varied by either without the consent of the other. **Village of West City v. Telephone Co.**, 372 Ill. 493, 495, 24 N. E. 2d 352, 353; **Springfield v. Inter-State Tel. Co.**, 279 Ill. 324, 327, 116 N. E. 631, 633. This contract clearly and explicitly limited the Company's payments to that amount, if any, by which its stated percentage of gross revenues from the sale of electricity exceeded the aggregate amount of all "fees, licenses, charges, taxes or other exactions of whatsoever kind or character" imposed by ordinance and which the Company paid or became liable to pay to the City.

The City in 1960 imposed a tax upon the Company by Utility Tax Ordinance No. 3698. The City stipulated with the Company:

> "8. Since August 1, 1960, the effective date of Ordinance No. 3698, Union Electric Company, has paid the full amount of the tax imposed upon it by the terms and provisions of Ordinance No. 3698 within the time specified in such ordinance," and
>
> "9. The tax imposed upon and paid by Union Electric Company to the City of East St. Louis under the terms and provisions of Ordinance No. 3698 for the calendar years 1960, 1961, 1962, 1963 and 1964 has, in each of such years, exceeded the total of the percentages of gross revenue, as determined under the terms and provisions of Ordinance No. 3193" (App. p. A-14).

The Company's contractual obligation to the City was defined and established in the franchise ordinance, the

terms of which plainly provided that the Company's utility tax payments excused payment under the franchise ordinance. The determination of the Circuit and Supreme Courts of Illinois to the contrary deprived the Company of a valuable contract right secured by the franchise ordinance and unconstitutionally impaired the franchise contract.

Municipal legislation enacted pursuant to state legislative authority is considered to be state law for the purpose of raising the constitutional question. **Mercantile Trust & Deposit Company of Baltimore v. City of Columbus,** 203 U. S. 311, 320, 27 S. Ct. 83, 51 L. ed. 198; **Hamilton Gaslight & Coke Co. v. Hamilton,** 146 U. S. 258, 13 S. Ct. 90, 36 L. ed. 963.

This Court will enforce the federal constitutional protection against impairment of contract when a state court has interpreted and enforced municipal legislation in a manner to defeat such guaranty.

Minneapolis v. Minneapolis Street R. Co., 215 U. S. 417, 30 S. Ct. 118, 54 L. ed. 259;

Detroit United Railway v. Michigan, 242 U. S. 238, 37 S. Ct. 87, 61 L. ed. 268;

Appleby v. New York, 271 U. S. 364, 46 S. Ct. 569, 70 L. ed. 992.

This Court, in so doing, exercises its independent judgment to determine if the contract obligation was impaired by subsequent legislation as enforced by the state court.

Detroit United Railway v. Michigan, 242 U. S. 238, 37 S. Ct. 87, 61 L. ed. 268;

Appleby v. New York, 271 U. S. 364, 46 S. Ct. 569, 70 L. ed. 992.

In **Detroit United Railway,** rates of fare within defined areas were fixed by franchise ordinances of 1899. The areas were extended by subsequent annexation legislation

which the Supreme Court of Michigan construed in a manner to alter the contracts expressed in the franchise ordinances. This court there held, 61 L. ed. 274:

> ". . . it is too well settled to be open to further debate, that where this court is called upon in the exercise of its jurisdiction to decide whether state legislation impairs the obligation of a contract, we are required to determine upon our independent judgment these questions: (1) was there a contract? (2) If so, what obligation arose from it? (3) Has that obligation been impaired by subsequent legislation?"

It concluded, p. 275:

> "It results that the provisions of the township and village ordinances respecting the rates of fare remained in full force and effect after the acquisition of the suburban lines by plaintiff in error, notwithstanding its previous acquisition of the city lines or the previous assent of the city railway companies to the ordinances of 1899. Because of the provision of Sec. 10 of art. 1 of the Constitution of the United States, it was not within the power of the state of Michigan by any subsequent legislation to impair the obligations of those contracts, and since the judgments of the supreme court of that state gave such an effect to the Annexation Acts of 1905 and 1907, in conjunction with the ordinances of 1889, as to impair those obligations, the judgments must be reversed."

To the same effect is **Cleveland v. Cleveland City R. Co.**, 194 U. S. 517, 24 S. Ct. 756, 48 L. ed. 1102.

The Illinois Supreme Court held that the Company's contract with the City was unimpaired because,

> ". . . the status quo of the contractual relationship is undisturbed."

The opposite is obvious. The franchise contract insured the Company's right to measure the basis for franchise payments against the utility taxes paid. The judgment of the Supreme Court of Illinois removed this right, required payments to be made which the franchise agreement excused and impaired the contract obligation.

(2) The Illinois Supreme Court disregarded the provisions of the utility tax ordinance and the stipulated facts of record and found that the utility tax was neither imposed upon nor paid by the Company. It held that the burden of the tax "clearly was to be on the consumers, not on the Company." It suggested that for this reason the formula clearly stated in the franchise contract for determining payments thereunder should be set aside since its application would give the Company "the best of possible worlds."

It was not the function of the Illinois Supreme Court to determine whether the franchise contract gave the Company this characterized advantage. Its function, rather, was to take the ordinance as it was and to give the usual and ordinary meaning to the language which was used. It had neither the right nor the duty under the guise of construction to rewrite the franchise contract which the City and Company had made.

Florida Cent. R. R. Co. v. Schutte, 103 U. S. 118, 13 Otto 118, 26 L. ed 327, 335;
Tews v. Woodhiser, 352 Ill. 212, 185 N. E. 827;
I. L. P., Cities and Villages, etc., Ch. 5, § 151, p. 465.

This Court early held that any alteration of a contract even though manifestly for the interest of the objecting party unconstitutionally impairs its obligation in violation of Article I, Section 10.

Dartmouth College v. Woodward, 4 Wheat. 518, 4 L. ed. 665.

The Illinois Supreme Court rejected the stipulated and admitted fact that the Company had paid the utility tax, found that it had not, ordered the franchise contract to be applied as though such tax had not been paid and unconstitutionally deprived the Company of its property without due process.

Duluth & Iron Range Railroad v. County of St. Louis, 179 U. S. 302, 21 S. Ct. 124, 45 L. ed. 201;

Stearns v. Minnesota ex rel. Marr, 179 U. S. 223, 21 S. Ct. 73, 45 L. ed. 162.

The constitutional protection reaches the Illinois Court's order, for:

> "The violation is nonetheless clear when that result is accomplished by the state judiciary in the course of construing an otherwise valid (**First Nat. Bank v. Weld County,** 264 U. S. 450, 68 L. ed. 784, 44 Sup. Ct. Rep. 385) state statute. The federal guaranty of due process extends to state action through its judicial, as well as through its legislative, executive, or administrative, branch of government."

Brinkerhoff-Faris Trust & Sav. Co. v. Hill, 281 U. S. 673, 50 S. Ct. 451, 74 L. ed. 1107, 1113.

(3) The City imposed the utility tax upon the Company under authority of the Illinois Municipal Code which authorized the taxation of occupations or privileges (Ill. Rev. Stat. 1965, Ch. 24, § 8-11-2). The Illinois Legislature, under an independent statute, the Public Utilities Act (Ill. Rev. Stat. 1965, Ch. 111⅔, § 36 (a)), extended permissive right to utilities to recover all or a part of such tax by a charge to its customers therefor. The Illinois court below found that the Company made a charge for the tax to its customers and thereby changed the tax from an occupation tax permitted by the Illinois Constitution, Article IX, to a consumer tax which is not so authorized. The Illinois court has uniformly treated other

occupation taxes precisely to the contrary. It held in **Nat. Bank of Hyde Park v. Isaacs**, 27 Ill. 2d 205, 207, 188 N. E. 2d 704, 705:

> "The retailers' occupation tax is levied upon the seller, and the custom of passing the burden to the buyer by means of a price increase does not alter its nature. It is the legal incidence of the tax that controls."

In **Winter v. Barrett**, 352 Ill. 441, 186 N. E. 113, the Court considered an act which imposed an occupation tax on retailers. It said there, p. 455:

> "The title of the act does indicate that the tax is upon persons engaged in the business of selling tangible personal property at retail. By section 2 the tax is imposed on such persons, and the measure of the tax is fixed as three per cent of the gross cash receipts from sales of tangible personal property by such persons. Section 3 provides for returns to be made by such persons giving information from which the amount of the tax may be determined. From these provisions it appears that the tax is imposed upon persons engaged in the business mentioned. They are the persons who are required to pay the tax. They are not made the agents of the State or of the Department of Finance to collect the tax from purchasers and pay it over to the department, but the tax is imposed on them and they are the ones who are required to pay it. By the provisions of the act they are neither required to take nor prohibited from taking into consideration the amount of tax to be paid by them in fixing the selling prices of articles sold."

p. 456:

> "So far as determining the character of the tax imposed by the act, they do not indicate that the tax

is on the purchasers or consumers but simply show that the General Assembly had in mind that persons engaged in business would, in fixing the price of articles sold by them, take into consideration the tax to be paid under the act, the same as they do their property taxes, rent and other expenses of doing business."

p. 457:

"We hold that the tax is not a property tax and is not a tax on purchasers of property but is a tax on persons engaged in the business of selling tangible personal property at retail—an occupation tax."

The Illinois Supreme Court finds that an occupation tax imposed upon companies other than the company here may be passed on to their customers without changing the incidence of the tax. The Court holds in the Company's case this cannot be done and arbitrarily denies the Company the constitutional guaranty of equal protection.

Hartford S. B. I. & Ins. Co. v. Harrison, 301 U. S. 459, 57 S. Ct. 838, 81 L. ed. 1223;

Louisville Gas & E. Co. v. Coleman, 277 U. S. 32, 48 S. Ct. 423, 72 L. ed. 770.

" 'Due process of law and the equal protection of the laws,' this court has said, 'are secured, if the laws operate on all alike, and do not subject the individual to an arbitrary exercise of the powers of government.' "

Connolly v. Union Sewer Pipe Company, 184 U. S. 540, 22 S. Ct. 431, 46 L. ed. 679, 689.

(4) The terms of the franchise ordinance are so explicitly clear and free from ambiguity they leave no room for construction.

62 C. J. S., **Municipal Corporations,** 442:

> "Where the language is clear and explicit and free from ambiguity, there is no room for construction, and the rules of construction are inapplicable. In such a case the ordinance must be interpreted according to its terms without resort to other means of interpretation."

The Illinois Supreme Court, however, undertook to construe the ordinance. In doing so it avoided guide lines set by this Court in **Florida Cent. R. R. Co. v. Schutte,** 103 U. S. 118, 13 Otto 118, 26 L. ed. 327, 335, that,

> ". . . contracts created by or entered into under the authority of statutes are to be interpreted according to the language used in each particular case to express the obligation assumed. . . . The object is to find out from the words used what the parties intended to do."

and disregarded its own rule stated in **People Ex Rel. Hafer v. Flynn,** 13 Ill. 2d 368, 377, that

> ". . . in construing many cases involving contracts created by acts of municipalities, Illinois courts have applied the standard rules of construction."

The Court considered the franchise contract as though it were a regulatory ordinance and construed it with the principal purpose "to determine the intent of the law making body." Those cases involving regulatory, licensing, zoning and penal ordinances which announce this rule and upon which the Court depended, have no application to the franchise ordinance. If construction was required the Court should have determined the intent of both Company and City, as parties to the franchise contract, as such intent appeared from the language used.

The language of the franchise ordinance clearly expresses the obligation assumed thereunder. The Illinois Supreme Court was dissatisfied with the result of the ap-

plication of such clearly expressed obligation. Such dissatisfaction, however, is an insufficient basis for attributing meaning to the franchise language which it plainly does not have.

THE EFFECT OF THE OPINION BELOW.

The opinion of the Supreme Court below strikes at the foundation of a basic constitutional guaranty of freedom from impairment of contract which this Court has jealously guarded and vigorously enforced from at least the time Chief Justice Marshall spoke for this Court in **Dartmouth College** almost a century and one-half ago.

The provisions of the franchise contract here involved, by common knowledge, are not unique. They may be found in same or similar form in franchise ordinances in a multitude of cities, towns and villages, large and small, throughout the State of Illinois. The substantial impact which the lower Court's opinion will have on petitioner is apparent on the record. What is not of record but which is of far greater significance is the circumstance that this opinion, if permitted to stand, will reach into contractual arrangements across all of Illinois and will stand as a forceful and compelling precedent for the abrogation of existing agreements and the unconstitutional impairment of the obligation of contract. This is the very real and present hazard which this case presents and which argues urgently for the issuance of this Court's writ.

If the Supreme Court of Illinois, or any other court, can ignore stipulated facts and clear and unequivocal language of a contract of which it disapproves and find in consequence that the agreement means something other than it plainly states, the sanctity of contract which the federal Constitution insures is rendered meaningless indeed.

Petitioner respectfully requests this Court to issue its writ of certiorari to the Supreme Court of Illinois.

Respectfully submitted,

UNION ELECTRIC COMPANY,
a Corporation,

By: ROBERT BRODERICK,
322 First National Bank Building,
East St. Louis, Illinois,

JAMES R. PARHAM,
322 First National Bank Building,
East St. Louis, Illinois,
Its Attorneys.

POPE and DRIEMEYER,
322 First National Bank Building,
East St. Louis, Illinois,
Of Counsel.

INDEX.

Page

Appendix A—Opinion of the Supreme Court of Illinois, May 18, 1967 ..... A-1

Appendix B—Order of Circuit Court of St. Clair County, Illinois, September 14, 1965 ..... A-10

Appendix C—Stipulation of Facts Filed in Trial Court A-13

Franchise Ordinance No. 3193 ..... A-16

Utility Tax Ordinance No. 3698 ..... A-22

APPENDIX A.

OPINION OF SUPREME COURT OF ILLINOIS.

No. 40178.

In the Supreme Court of Illinois.

November Term, 1966.

City of East St. Louis,
Appellee,

vs.

Union Electric Company,
Appellant.

Opinion filed May 18, 1967—Rehearing denied September 27, 1967.

Mr. Justice Ward delivered the opinion of the court:

The plaintiff, the city of East St. Louis (hereafter called the City), filed suit for a declaratory judgment in the circuit court of St. Clair County and asked that the court declare that the defendant, Union Electric Company (hereafter called the Company), was obligated to the City under the terms of a franchise ordinance and did not have the right to deduct moneys paid to the City under a utility tax ordinance from monies otherwise due the City under the franchise ordinance.

The court entered judgment for the City. A constitutional question is concerned in this appeal by the Company.

On November 30, 1948, the city of East St. Louis passed ordinance No. 3193, the franchise ordinance. This ordinance granted to the defendant "* * * the right to construct, maintain and operate an electric distribution and transmission system in the streets, alleys and all other public places in the city of East St, Louis * * *." As consideration for the franchise to be granted, the ordinance provided that the Company would pay to the City $18,500 within five days after the ordinance became effective, and $25,000 for the year 1949. For the years 1950 through 1979 the ordinance provided that the Company would pay the City annually an amount by which "* * * 2% of the gross revenue up to but not in excess of $500,000.00 from the sale by Company in the preceding calendar year to all customers in the City of East St. Louis (except the City of East St. Louis and other municipalities, political subdivisions and municipal or governmental agencies) of electric energy for use in the City of East St. Louis; 1½% on the gross revenue from all such sales in excess of $500,000.00 and up to but not in excess of $1,000,000.00; 1% on the gross revenue from all such sales in excess of $1,000,000.00 and up to but not in excess of $1,500,000.00, and ½% on the gross revenue from all such sales in excess of $1,500,000.00, shall exceed the aggregate amount of all payments made by Company to the City of East St. Louis, or which accrued and for which Company became liable, during the preceding calendar year, for or on account of permit and inspection fees, or any other fees, licenses, charges, taxes or other exactions of whatsoever kind or character not in derogation of the rights, franchise, permission and authority hereby granted (except general taxes on tangible property) imposed by any valid ordinance of the City of East St. Louis."

On December 2, 1948, the Company filed with the City its written acceptance of the terms, provisions and conditions of the franchise ordinance. This formed a contract which by section 9 of the ordinance would be in effect until December 31, 1979.

Thereafter, the Company fully satisfied its liability under the terms of the franchise ordinance for each calendar year up to and including 1959. However, since 1960 the Company has not made any payments to the City pursuant to the franchise ordinance. The Company has denied that it has incurred any liability under the terms of the franchise ordinance since the enactment by the City of the utility tax ordinance (No. 3698) on June 15, 1960, pursuant to authority granted to the City by the legislature in section 8—11—2 of the Illinois Municipal Code (Ill. Rev. Stat. 1965, chap. 24, par. 8—11—2). This utility tax ordinance provides in pertinent part that a tax be imposed on all persons engaged in certain designated occupations or privileges, including "Persons engaged in the business of distributing, supplying, furnishing, or selling electricity for use consumption within the corporate limits of the City of East St. Louis, Illinois, and not for resale, at the rate of 4.48% of the gross receipts therefrom."

In addition, section 36 of the Public Utilities Act (Ill. Rev. Stat. 1965, chap. 111⅔, par. 36) provides in paragraph (a) that whenever a tax is imposed on a public utility by a municipality pursuant to section 8—11—2 of the Illinois Municipal Code, such utility may bill its customers "* * * an additional charge equal to the sum of (1) an amount equal to such municipal tax, or any part thereof, (2) 3% of such tax, or any part thereof, as the case may be, to cover cost of accounting, * * *." Paragraph (a) of the Act also requires that the additional charge be separately stated on the utility bill of each customer.

For the year 1960 and each subsequent year the Company has paid to the City the amounts due under the terms of the utility tax ordinance, and the Company has billed its customers a separate, additional charge equal to the utility tax required to be paid, plus 3 percent of such tax to cover accounting costs. The Company does not question the validity of the utility tax ordinance. However, the Company does contend that the payments it makes under the terms of the utility tax ordinance qualify under section 6 (B) (b) of the franchise ordinance as "* * * taxes * * * imposed by any valid ordinance of the City of East St. Louis," so as to permit such utility tax payments to be deducted from any liability the Company may have to the City under the franchise ordinance and this according to the express provisions of the franchise ordinance.

Thus, the Company argues that in 1960 and thereafter to date it has had no financial obligation to the City under the provisions of the franchise ordinance, because its payments pursuant to the utility tax ordinance for these years have exceeded the total of the concerned percentages of the Company's gross revenues from the sale of electric energy calculated under section 6 (B) (a) of the franchise ordinance. The Company argues that the language of the franchise ordinance in expressing the intent of the parties is clear and does not require construction. Further, the Company contends that section 3 of the utility tax ordinance unconstitutionally impairs the Company's contract with the City under the franchise ordinance by providing that such utility tax "* * * shall be in addition to the payment of money, * * * as compensation for the use of its streets, alleys, or other public places, or installation and maintenance therein, thereon, or thereunder of poles, wires, pipes or other equipment used in the operation of the taxpayers' business."

The City argues that the payments made to it by the Company under the utility tax ordinance are not "taxes" within the intendment of section 6 (B) (b) of the franchise ordinance. The rationale of this position is that the utility tax is in reality an assessment against the electrical consumers and not against the Company, since the charge is authorized to be made against the consumers, the charge is in fact made against and actually paid by the consumers, and the Company receives and retains 3% of the tax monies received to cover its costs of collection.

Basically, these arguments were addressed to the trial court by the City and the Company. The court ruled for the City on the basis of the intent of the parties as expressed in the franchise ordinance. The court *inter alia* observed that there was no dispute that the utility tax was passed on to its consumers by the Company and that the additional charge it imposed on its consumers was sufficient to cover its accounting expenses. The court found also there was no dispute that the amount the Company received from its consumers was equal to or in excess of the amount the Company paid the City under the utilities tax ordinance.

It will be useful in considering the problem presented to review briefly certain rules of construction. We observe that the same rules which govern the construction of statutes are to be applied in construing municipal ordinances. (*Village of Park Forest v. Wojciechowski,* 29 Ill. 2d 435; *Dean Milk Co. v. City of Chicago,* 385 Ill. 565.) The primary purpose of the construction of ordinances is to determine the intent of the lawmaking body as revealed by the language used. (*Reitman v. Village of River Forest,* 9 Ill. 2d 448; *City of Nameoki v. City of Granite City,* 408 Ill. 33.) And a construction leading to an absurd result will be avoided, if possible. (*Harrison v. People ex rel. Boetter,* 195 Ill. 466; *People ex rel. Barrett v. Thillens,* 400 Ill. 224.) Whenever a word or phrase used in an ordinance

becomes an issue in a legal proceeding its strict meaning is not as important as the sense in which it was used by the lawmaking body, (*Jennings v. Calumet National Bank,* 348 Ill. 108; *Du Bois v. Gibbons,* 2 Ill. 2d 392) and "A statute or ordinance must receive a sensible construction, even though such construction qualifies the universality of its language." *City of Elmhurst v. Buettgen,* 394 Ill. 248, 253.

We deem that the only reasonable interpretation to be made of the two ordinances in conjunction requires that the Company's liability under the franchise ordinance be determined under the terms of such ordinance without regard to any payments the Company may have advanced to the City from its consumers under the utility tax ordinance.

On a literal and superficial view it might appear as if the utility tax ordinance imposed a tax burden upon the Company, but on examination it is evident that the burden was placed on the consumers. The Company as authorized simply passed on the new charges to its consumers and the consumers not only paid such charges to the City but also paid the Company the expenses it incurred while serving as a collector or conduit of taxes from the consumers to the City. Adoption of the Company's argument would give it the best of possible worlds. Its reasoning would permit the Company to have its consumers pay the burdens of the utility tax ordinance without the Company's incurring any real liability, and at the same time the Company would be able to relieve itself of its real and defined liabilities under the franchise ordinance by setting off payments made by its consumers under the utility tax ordinance. If we accept the Company's position that the utility tax ordinance really imposed a tax on the Company in the usual sense, then such imposition incongruously would terminate (as to the years here concerned, at least) the Company's liabilities under the franchise ordinance, increase its profits and reduce its expenses while increasing the costs of its consumers.

Plainly, such a construction would be unreasonable. The Company cannot plead that it has the burden of the utility tax and then pass it on to its consumers and in the same voice relieve itself of its obligations under the franchise ordinance by pleading tax payments under the utility tax ordinance which were not made by it.

It is manifest to us that when the City and Company entered into the franchise contract by means of the franchise ordinance the parties did not intend that payments which might be received by the City from the Company's consumers, (as here under the utility tax ordinance), should be deemed taxes paid by the Company within the meaning of the franchise ordinance so as to permit their being set off against the determined liabilities of the Company under the franchise contract.

The legislature in authorizing the imposition of additional charges by municipalities through ordinances such as the utility tax ordinance here did not contemplate that an enacting municipality would thereby be decreasing other revenues, unless the municipality so intended, for the authorizing statute provides that any new tax thereunder "* * * may be in addition to the payment of money, or value of products or services furnished to the municipality * * *." (Ill. Rev. Stat. 1965, chap. 24, par. 8—11—2.) The City certainly intended that revenues received under the utility tax ordinance were to be independent of other revenue sources, as section 3 of such ordinance provides: "Such tax shall be in addition to the payment of money, or value of products or services furnished to this municipality by the taxpayer as compensation for the use of its streets, alleys, or other public places, or installation and maintenance therein, thereon, or thereunder of poles, wires, pipes or other equipment used in the operation of the taxpayers' business."

Too, section 6 of the ordinance declares: "The city has immediate need for the revenue to be produced by the tax

imposed by this ordinance in order to meet the cost of providing services necessary for the immediate preservation of the public peace, health and safety, and this ordinance is passed as an urgent measure." It is obvious the City did not contemplate that by enacting the ordinance it would be affecting disadvantageously its source of revenue under the franchise ordinance by reducing the Company's obligations.

It is apparent from what we have said that we deem that the argument of the Company that the utility tax ordinance unconstitutionally impairs the obligation of contract between it and the City is without merit. The franchise contract and the rights and obligations thereunder, are not altered, amended or impaired by the utility tax ordinance. Under the tax ordinance the consumers paid the taxes and the Company was but a conduit for the transmittal of moneys to the City. Its consumers paid the Company its costs of transmitting the funds. The Company so far as the franchise contract was concerned remains in the same position it occupied prior to the enactment of the utility tax ordinance. Where the *status quo* of the contractual relationship is undisturbed it cannot be plausibly said that there has been any impairment of contract.

The cases relied on by the Company in this argument are factually distinguishable from those of this case. In *Village of West City v. Illinois Commercial Telephone Co.*, 372 Ill. 493, the village passed an ordinance on May 7, 1912, which granted the phone company the right to construct a telephone system in the village. The company was to furnish in return certain nonfinancial considerations to the village. On March 7, 1938, the municipality adopted a resolution which purported to repeal the franchise ordinance and to levy a one-dollar annual rental against each of the company's poles in excess of a designated height as compensation for the use of village property occupied

by each pole. The issue in this case was whether the 1912 ordinance was a contract or only a license revocable at will. The court held that it was a contract which could not be varied by one of the parties. Further, the court held that the consideration given precluded the village from later demanding another and different consideration. Here, there has been no such attempt by the City to vary the terms of a contract by a later ordinance which seeks to repeal the earlier contract ordinance and exact a consideration different from the consideration called for in the earlier ordinance. Enforcement of the utility tax ordinance here does not change the Company's financial obligations under the franchise ordinance.

City of Springfield v. Inter-State Independent Telephone and Telegraph Co., 279 Ill. 324, and *City of Springfield v. Springfield Consolidated Railway Co.*, 208 Ill. App. 11, also involved ordinances which sought to impose rental charges for the use of municipal property which would have been in addition to the considerations called for by the franchise contracts concerned. The cases are not pertinent here.

The judgment of the circuit court of St. Clair County is affirmed.

Judgment affirmed.

APPENDIX B.

ORDER OF CIRCUIT COURT OF ST. CLAIR COUNTY, ILLINOIS ENTERED SEPTEMBER 14, 1965.

The City of East St. Louis, Illinois, filed a complaint for declaratory judgment seeking a declaration of rights as between it and the defendant, Union Electric Company, under the terms and conditions of an Ordinance No. 3193 adopted in 1958 granting authority to the defendant to construct and operate an electrical distribution system in the City and under the terms of which franchise ordinance the defendant was obliged to make payment in accordance with a schedule incorporated as part of the ordinance.

The defendant contends that the payments under the franchise ordinance are not due because the plaintiff adopted a Utilities Tax Ordinance. The issues drawn between the pleadings are the defendant contends that upon the adoption of the Utilities Tax Ordinance by the City of East St. Louis, Illinois, known as Ordinance No. 3698 in June, 1960, the franchise tax under the terms of the franchise agreement ordinance was no longer payable. It relies upon a clause in the franchise agreement which has been introduced into evidence. The amount due under the Franchise Ordinance is a percentage up to a certain amount of the gross sales which percentage decreases as the sales increase but it is stated that this amount shall only be paid if it shall exceed the aggregate amount of all payments made by the defendant for and on account of permit and inspection fees or any other fees, licenses, charges, taxes or exactions of whatsoever kind. The issue: the defendant claims that under the provision of this franchise agreement and ordinance, the Utilities Tax Ordinance comes within the terms and meanings of the word "taxes" as used in Section 6, Paragraph

B of the franchise agreement. The plaintiff contends that under the terms of Chapter 111⅔, Section 36, Illinois Revised Statutes, 1963, a utility which comes under a utilities tax by a municipality's adoption of an ordinance may in addition to any rate authorized by the public utilities act charge its customers an additional amount equal to the sum of: "an amount equal to such municipal tax, 3% of such tax or any part thereof to cover the cost of accounting and an amount equal to the increase in taxes and other payments to governmental bodies resulting from the amount of such additional charge."

There is no dispute that the defendant did levy the additional charge to its customers as it was permitted to do under the terms of the Illinois Revised Statutes of 1961, Chapter 111⅔, Section 36. There is no dispute that the utilities tax is passed on to its customers by the defendant and that the additional charge it makes to the customers is sufficient to cover all costs of accounting and the amount derived from its customers is equal to or in excess of the amount it pays to the City under the terms of the Utilities Tax Ordinance No. 3698.

The court having heard the arguments of counsel and having reviewed the stipulation of facts which was entered into and having examined the documentary evidence herewith makes a declaration of the following rights and duties under the terms of the Franchise Ordinance No. 3193 and the Utilities Tax Ordinance No. 3698:

1. It has jurisdiction of the subject matter and the parties hereto.

2. That the defendant is a corporation duly organized and existing under the state of Missouri and authorized to conduct and engage in business in the State of Illinois and prior to and since November 30, 1948, has been engaged in the business of furnishing electric service in the City of East St. Louis, Illinois.

3. On November 30, 1948, Ordinance No. 3193, the Franchise Ordinance, was adopted by the City Council of the City of East St. Louis, and acepted by the defendants. Under the terms of this ordinance the defendant is not relieved of its obligation to make its payments to the City by the City adoption of Ordinance No. 3698, commonly known as the Utilities Tax Ordinance, because of the intent of the parties and the wording and phrasing of the Franchise Ordinance, the amount of money collected by the defendant pursuant to Ordinance 3698, does not constitute a tax or taxes within the meaning of Section 6, Paragraph B of the Franchise Ordinance. This is based on the action of the defendant in levying the additional charge pursuant to Chapter 111⅔, Section 36 of the Illinois Revised Statutes 1963, which permits the defendant to collect the tax under the terms of Ordinance 3193, the Franchise Ordinance, for the entire term of the Franchise Agreement, and the defendant is obliged to make the payments to the plaintiff in accordance with the terms and conditions of Ordinance 3193, notwithstanding the adoption of Ordinance No. 3698 by the plaintiff.

Richard T. Carter,
Judge.

Dated this 14th day of September, 1965, A. D.

APPENDIX C.

STIPULATION OF FACTS FILED IN CIRCUIT COURT OF ST. CLAIR COUNTY, ILLINOIS, FEBRUARY 5, 1965.

It Is Stipulated by and between the City of East St. Louis, plaintiff, and Union Electric Company, a Corporation, defendant, as follows:

1. The City of East St. Louis, is located in St. Clair County, Illinois, is a municipal corporation organized and existing under the Illinois Municipal Code, and operating with the Commission form of government.

2. Union Electric Company is a corporation duly organized and existing under the laws of the State of Missouri, is duly authorized to conduct and engage in business in the State of Illinois and is the successor to Union Electric Power Company, a Corporation.

3. Prior to November 30, 1948, and continuously since that date, Union Electric Company or its predecessors have and Union Electric Company now is engaged in the business of furnishing electric service in the City of East St. Louis. Union Electric Company had and continues to have, the right to engage in such business in the City of East St. Louis and was granted, had and continues to have the right to occupy public property in connection therewith, by ordinances enacted by the City of East St. Louis and the provisions, terms and conditions of which were duly accepted by Union Electric Company and its predecessors.

4. A true copy of Ordinance No. 3193 passed by the City Council of the City of East St. Louis on November 30, 1948, and approved on November 30, 1948, is attached hereto as "Exhibit A" to this stipulation. Union Electric Power Company accepted the provisions, terms and con-

ditions of Ordinance No. 3193 and a true and correct copy of such acceptance, dated December 2, 1948, is attached to and made a part of "Exhibit A." Subsequent to the enactment and acceptance of Ordinance No. 3193 the name of Union Electric Power Company was changed to Union Electric Company.

5. Union Electric Company has, since the enactment and acceptance of Ordinance No. 3193, utilized the right, franchise, permission and authority granted by and has assumed and discharged, and continues to assume and discharge, the obligations imposed by the terms and provisions of Ordinance No. 3193.

6. Union Electric Company paid the City of East St. Louis $18,500.00 within the time specified by Section 6 (A) of Ordinance No. 3193, and the further sum of $25,000.00 on or before March 1, 1949, as required by the provisions of Sections 6 (B) and (C) of Ordinance No. 3193. In addition, for each of the calendar years 1950 to 1959, both inclusive, Union Electric Company paid the City of East St. Louis the full amount due the City of East St. Louis for each of such calendar years under the terms and provisions of Sections 6 (B), (a) and (b) of Ordinance No. 3193 and within the times specified by Section 6 (C) of such ordinance.

7. A true and correct copy of Ordinance No. 3698 passed, signed and recorded by the City Council of the City of East St. Louis on June 15, 1960, is attached hereto as "Exhibit B" to this stipulation.

8. Since August 1, 1960, the effective date of Ordinance No. 3698, Union Electric Company, has paid the full amount of the tax imposed upon it by the terms and provisions of Ordinance No. 3698 within the time specified in such ordinance.

9. The tax imposed upon and paid by Union Electric Company to the City of East St. Louis under the terms

and provisions of Ordinance No. 3698 for the calendar years 1960, 1961, 1962, 1963, and 1964 has, in each of such years, exceeded the total of the percentages of gross revenue, as determined under the terms and provisions of Ordinance No. 3193 and Sections 6 (B) and (a) thereof, and received by Union Electric in each of such years from the sale of electric energy for use in the City of East St. Louis.

10. Union Electric Company has paid no amount of money to the City of East St. Louis under the provisions of Section 6 of Ordinance No. 3193 for the calendar years 1960, 1961, 1962, 1963 and 1964.

11. The Court may consider the stipulation and "Exhibits A and B" thereto, together with the pleadings filed by plaintiff and defendant, and such other evidence, if any, which the parties, or either of them, may offer, in reaching a determination of the issues in this litigation.

Robert F. Godfrey,
Thomas A. Matthews,
Attorneys for Plaintiff.

Pope and Driemeyer,
By Robert Broderick,
Attorneys for Defendant.

"Exhibit A".

Ordinance No. 3193.

An Ordinance Granting to Union Electric Power Company, Its Successors and Assigns, the Right to Construct, Maintain and Operate an Electric Distribution and Transmission System in the Streets, Alleys, and All Other Public Places in the City of East St. Louis, and Repealing Section 6 of Ordinance No. 1546 of the City of East St. Louis, Passed on January 11, 1909, and Approved on January 12, 1909.

Be It Ordained by the City Council of the City of East St. Louis, in the State of Illinois:

Section 1. In consideration of the payments hereinafter provided to be made to the City of East St. Louis, St. Clair County, Illinois, hereinafter called the "City", by Union Electric Power Company, a corporation organized and existing under and by virtue of the laws of Illinois, its successors and assigns, hereinafter called the "Company", full right, franchise, permission and authority is hereby granted and given to the Company to construct, reconstruct, excavate for, place, repair, maintain, operate and use all necessary or appropriate poles, towers, conduits, wires, cables, conductors and other equipment and apparatus, and all necessary or appropriate appurtenances and appliances in connection therewith, in, upon, along, over and under, through and across all present and future streets, alleys, highways, sidewalks, bridges, subways, viaducts, public property and public places within the corporate limits of the City of East St. Louis, as now existing and as hereafter extended, for the purpose of furnishing and distributing electricity for light, heat, power and other purposes for public and private use within the City of East St. Louis and in territory adjacent thereto, and for the purpose of transmitting electricity through said

City, for a period beginning with the effective date of this ordinance and ending on the 31st day of December, 1979, subject, however, to the right of the City to control the use, improvement and repair of the streets, alleys and other public places within said City, and to make and enforce all reasonable and lawful police regulations concerning the placing and operating of such poles, towers, conduits, wires, cables, conductors and other equipment, apparatus, appurtenances and appliances.

Section 2. All such poles, wires, conduits, cables, conductors and other equipment and apparatus shall be constructed and maintained in conformity with construction rules and standards promulgated by the Illinois Commerce Commission or other governmental regulatory authority having jurisdiction of the subject.

Section 3. Company shall indemnify, save and keep harmless the City from any and all damage and injury which the City may sustain by reason of any acts of negligence of the Company or any of its employees while engaged in and about the business of the Company.

Section 4. The charge for energy consumed by the consumers within the City shall be in conformity with the schedules of rates filed from time to time by the Company with the Illinois Commerce Commission of the State of Illinois.

Section 5. The City shall have the right to string necessary wires upon the poles of the Company for the purpose of installing a system of police and fire alarm signals without charge for the use thereof. Such installation on Company poles shall first be approved in writing by the Company and constructed and maintained by the City in conformity with rules and standards described in Section 2 of this ordinance.

Section 6. As the sole and exclusive consideration for the rights, franchise, permission and authority hereby granted, the Company shall pay to the City:

(A) The amount of $18,500.00 within 5 days after this ordinance shall become legally effective in accordance with the laws of the State of Illinois.

(B) For the calendar year 1949 the amount of $25,000.00, and for each calendar year thereafter, to and including the calendar year 1979, an amount, if any, by which:

(a) an amount which shall be the total of 2% of the gross revenue up to but not in excess of $500,000.00 from the sale by Company in the preceding calendar year to all customers in the City of East St. Louis (except the City of East St. Louis and other municipalities, political subdivisions and municipal or governmental agencies) of electric energy for use in the City of East St. Louis; 1½% on the gross revenue from all such sales in excess of $500,000.00 and up to but not in excess of $1,000,000.00; 1% on the gross revenue from all such sales in excess of $1,000,000.00 and up to but not in excess of $1,500,000.00, and ½% on the gross revenue from all such sales in excess of $1,500,000.00,

shall exceed

(b) the aggregate amount of all payments made by Company to the City of East St. Louis, or which accrued and for which Company became liable, during the preceding calendar year, for or on account of permit and inspection fees, or any other fees, licenses, charges, taxes or other exactions of whatsoever kind or character not in derogation of the rights, franchise, permission

and authority hereby granted (except general taxes on tangible property) imposed by any valid ordinance of the City of East St. Louis.

(C) The payments to be made for the year 1949 and subsequent years shall be made on or before March 1st of each said year.

Section 7. Section 6 of Ordinance No. 1546 of the City of East St. Louis entitled "An Ordinance authorizing the Consumers Light, Heat and Power Company to furnish electricity for lighting, heating and power purposes to consumers in the City of East St. Louis and to make excavations and to erect poles in certain streets and alleys and to place in the said excavations conduits, cables, pipes and other necessary instruments and appliances, to string wires on said poles, as well as on the poles and in the conduits of other companies doing business in the City of East St. Louis, by agreement of said companies and to acquire by purchase, lease or otherwise conduits, cables, pipes and conveyances of other companies doing business in said City and to operate the same," is hereby repealed, but, except as to the provisions of said Section 6 thereof, said ordinance shall remain in full force and effect in accordance with the terms and provisions thereof.

Section 8. The rights, franchise, permission and authority granted by this ordinance are and are intended to be in addition to any and all rights, franchise, permission and authority the Company now has to construct, maintain and operate an electric distribution and transmission system in the streets, alleys, and all other public places in the City of East St. Louis, and not in derogation thereof or substitution therefor.

Section 9. This ordinance shall remain on file with the City Clerk for public inspection, in the form in which it is finally passed, at least one week before

the final passage thereof, and shall be in full force and effect from and after thirty days after its final passage and approval in manner and form as required by the statute in such case made and provided. Within thirty days after the final passage of this ordinance, the Company shall file with the City Clerk of the City of East St. Louis its acceptance in writing of the provisions, terms and conditions of this ordinance, and thereupon this ordinance and the rights, franchise, permission and authority hereby granted, and the acceptance thereof by the Company, shall constitute and be effective as a contract until December 31, 1979.

Introduced and read November 23, 1948.

Filed with the City Clerk for public inspection, November 23, 1948.

Passed November 30, 1948.
Approved November 30, 1948.
Published December .., 1948.

John T. Connors,
Mayor.

Russell T. Beebe,
John D. English,
Alvin G. Fields,
Joe W. Ganschinietz,
Commissioners.

Attest:

John Tierney,
City Clerk.

City Clerk's Certificate.

State of Illinois,
St. Clair County,
City of East St. Louis.

I, D. P. O'Brien, City Clerk of the City of East St. Louis, Illinois, do hereby certify that the above and foregoing is a true and correct copy of Ordinance No. 3698 passed by City Council of East St. Louis, St. Clair County, Illinois, at regular meeting held on Wednesday, June 15, 1960, at ten o'clock by the following "aye" and "nay" vote:

Aye. Commissioner Russell T. Beebe, Mayor Alvin G. Fields, Commissioners Dan Foley, Ed. Lehman.

Nay. None.

Absent. Commissioner Robert J. Keeley.

And I further certify that the original Ordinance of which the foregoing is a certified copy, is by law intrusted to my custody for safe keeping, and is on file in my office.

Witness my hand and the corporate seal of said city, this 20 day of June A. D. 1960.

D. P. O'Brien,
City Clerk of East St. Louis, Illinois.

Acceptance.

The provisions, terms and conditions of Ordinance No. 3193, entitled:

"An Ordinance Granting to Union Electric Power Company, Its Successors and Assigns, the Right to Construct, Maintain and Operate an Electric Distribution and Transmission System in the Streets,

Alleys, and All Other Public Places in the City of East St. Louis, and Repealing Section 6 of Ordinance No. 1546 of the City of East St. Louis, Passed on January 11, 1909, and Approved on January 12, 1909", passed by the City Council of the City of East St. Louis on the 30th day of November, 1948, and approved on the 30th day of November, 1948, are hereby accepted, and Union Electric Power Company hereby agrees to all of the provisions, terms and conditions thereof.

Dated at St. Louis, Missouri, this 2nd day of December, A. D. 1948.

Union Electric Power Company,
By John A Woodbridge,
Vice President.

Attest: E. J. Shapiro,
Secretary.

"Exhibit B".

Ordinance No. 3698.
Municipal Utility Tax.

Be It Ordained by the City Council of the City of East St. Louis, Illinois, That:

Section 1. A tax is imposed on all persons engaged in the following occupations or privileges:

a. Persons engaged in the business of transmitting messages by means of electricity, at the rate of 4.48% of the gross receipts from such business originating within the corporate limits of the City of East St. Louis, Illinois.

b. Persons engaged in the business of distributing, supplying, furnishing, or selling gas for use or consumption within the corporate limits of the City of

East St. Louis, Illinois, and not for resale, at the rate of 4.48% of the gross receipts therefrom.

c. Persons engaged in the business of distributing, supplying, furnishing, or selling electricity for use or consumption within the corporate limits of the City of East St. Louis, Illinois, and not for resale, at the rate of 4.48% of the gross receipts therefrom.

d. Persons engaged in the business of distributing, supplying, furnishing, or selling water for use or consumption within the corporate limits of the City of East St. Louis, Illinois, and not for resale, at the rate of 4.48% of the gross receipts therefrom.

Section 2. No tax is imposed by this ordinance with respect to any transaction in interstate commerce or otherwise to the extent to which said business may not, under the constitution and statutes of the United States, be made subject to taxation by this State or any political subdivision thereof; nor shall any persons engaged in the business of distributing, supplying, furnishing, or selling gas, water, or electricity, or engaged in the business of transmitting messages be subject to taxation under the provisions of this ordinance for such transactions as are or may become subject to taxation under the provisions of the "Municipal Retailers' Occupation Tax Act" authorized by Section 23-111 of the "Revised Cities and Villages Act," approved August 15, 1941, as amended.

Section 3. Such tax shall be in addition to the payment of money, or value of products or services furnished to this municipality by the taxpayer as compensation for the use of its streets, alleys, or other public places, or installation and maintenance therein, thereon, or thereunder of poles, wires, pipes or other equipment used in the operation of the taxpayers' business.

Section 4. For the purpose of this Ordinance the following definitions shall apply:

a. "Gross receipts" means the consideration received for the transmission of messages excluding the consideration received in coin operated telephones, for messages originating at coin operated telephones, and further excluding all consideration received for the transmission of long distance telephone messages where a separate charge is made for each individual long distance telephone message or telephone conversation, or the distributing, supplying, furnishing, or selling gas, electricity, or water for use or consumption and not for resale, as the case may be; and for all services rendered in connection therewith valued in money; whether received in money or otherwise, including cash, credit, service and property of every kind and material and for all services rendered therewith, and shall be determined without any deduction on account of the cost of transmitting said messages without any deduction on account of the cost of the service, product or commodity supplied, the cost of the materials used, labor or service cost, or any other expenses whatsoever.

b. "Transmitting messages," in addition to the usual and popular meaning of person to person communication, shall include the furnishing, for a consideration, of services or facilities (whether owned or leased), or both, to persons in connection with the transmission of messages where such persons do not, in turn, receive any consideration in connection therewith, but shall not include such furnishing of services or facilities to persons for the transmission of messages to the extent that any such services or facilities for the transmission of messages are furnished for a consideration, by such persons to other persons, for the transmission of messages.

c. "Person" means any natural individual, firm, trust, estate, partnership, association, joint stock company, joint adventure, corporation, municipal corporation or political subdivision of the State, or a receiver, trustee, conservator or other representative appointed by order of any court.

Section 5. This ordinance shall take effect after publication and the tax provided for herein shall be based on the gross receipts, as herein defined, actually paid to the taxpayer for services rendered on or after the 1st day of August, 1960.

Section 6. The city has immediate need for the revenue to be produced by the tax imposed by this ordinance in order to meet the cost of providing services necessary for the immediate preservation of the public peace, health and safety, and this ordinance is passed as an urgent measure.

Section 7. On or before the last day of November, 1960, each taxpayer shall make a return to the City Treasurer for the months of August and September, 1960, stating:

1. His name;
2. His principal place of business;
3. His gross receipts during those months upon the basis of which the tax is imposed;
4. Amount of tax;
5. Such other reasonable and related information as the corporate authorities may require.

On or before the last day of every third month, thereafter, each taxpayer shall make a like return to the City Treasurer for the preceding Calendar Quarter.

The Taxpayer making the return herein provided for shall, at the time of making such return, pay to the City Treasurer, the amount of tax herein imposed; provided that in connection with any return the taxpayer may, if he so elects, report and pay an amount based upon his

total billings of business subject to the tax during the period for which the return is made (exclusive of any amounts previously billed) with prompt adjustments of later payments based upon any differences between such billings and the taxable gross receipts.

Section 8. If it shall appear that an amount of tax has been paid which was not due under the provisions of this ordinance, whether as the result of a mistake of fact, or any error of law, then such amount shall be credited against any tax due, or to become due, under this ordinance from the taxpayer who made the erroneous payment provided that no amounts erroneously paid more than three (3) years prior to the filing of a claim therefor shall be so credited.

Section 9. No action to recover any amount of tax due under the provisions of this ordinance shall be commenced more than three (3) years after the due date of such amount.

Section 10. Any taxpayer who fails to make a return, or who makes a fraudulent return, or who willfully violates any other provision of this ordinance is guilty of a misdemeanor and, upon conviction thereof, shall be fined not less than one hundred dollars ($100.00) nor more than two hundred dollars ($200.00) and in addition shall be liable in a civil action for the amount of tax due.

Section 11. Ordinance No. 3696 and all other ordinances in conflict with this are hereby repealed.

This ordinance shall take effect on the first day of August, 1960, following its passage.
Filed June 8, 1960.

Alvin G. Fields,
Mayor.

Signed June 15, 1960.
Passed June 15, 1960.
Recorded June 15, 1960.
Published June 17, 1960.

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In the

Supreme Court of the United States

OCTOBER TERM, 1967.

CITY OF EAST ST. LOUIS,

Respondent,

vs.

UNION ELECTRIC COMPANY,
a Corporation,

Petitioner.

BRIEF OF RESPONDENT CITY OF EAST ST. LOUIS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INDEX

PAGE

Opinions Below 1

Questions Presented 2

Statement of the Case 3

Argument 5

Conclusion 9

Table of Cases.

City of East St. Louis v. Union Electric Company, 37 Ill. 2d 537, 229.N.E. 2d 522 3

Duluth and Iron Range Railroad v. County of St. Louis, 179 U.S. 302, 21 S. Ct. 124, 45 L. Ed. 201 8

St. Louis v. United Railways Co., 210 U.S. 266, 28 S. Ct. 630, 52 L. Ed. 1054 7

Stearne v. Minnesota ex rel Mar, 179 U.S. 223, 21 S. Ct. 73, 45 L. Ed. 162 8

Winter v. Barrett, 352 Ill. 441, 186 N.E. 113 ..... 6, 7

Statutes and Ordinances Cited.

Ill. Rev. Stat, 1933, Ch. 120, §4.41 ..... 2, 6, 7

Ill. Rev. Stat, 1965, Ch. 111⅔, Sec. 36(a) 2

Ill. Rev. Stat, 1965, Ch. 24, par. 8-11-2 5

East St. Louis Ill., Ordinance 3193 ..... 5, 6

East St. Louis, Ill., Ordinance 3698 ..... 2, 3, 5

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OPINIONS BELOW

The opinion of Circuit Judge Richard T. Carter is unreported and is printed at pages A-10 to A-12 of the appendix to the Petition.

The opinion of the Supreme Court of Illinois is reported in 37 Ill. 2d 537, 229 N.E. 2d 522 and is printed in the appendix to the Petition at pages A-1 to A-9.

QUESTIONS PRESENTED

The first question presented by the Petitioner omits any reference to the fact that the Petitioner, Union

Electric Company, collected the tax under the ordinance enacted subsequently to the franchise ordinance from its consumers and retained three per cent (3%) of those collections to cover its cost of collecting and remitting the tax to the City in accordance with Illinois Revised Statutes, 1965, Chapter 111⅔, Section 36 (a), (Public Utilities Act). The question should be: Is the subsequent tax in effect a taxing of the consumer rather than a taxing of the Company so that such tax would not impair the obligation of the franchise contract. This question was decided adversely to the Petitioner by the Supreme Court of Illinois.

In its second question, the Petitioner improperly raised for the first time a due process question. The Petitioner further fails to set out that it admitted in its answer to the original complaint filed in the Circuit Court of St. Clair County that it collected the taxes paid pursuant to the ordinance enacted subsequently to the franchise ordinance from its consumers, retaining three per cent (3%) of such collections as its cost: What property, therefore, is the Company being deprived of without due process? The Petitioner has sustained no damages or loss as a result of the later tax.

Petitioner, in its third question, again raises a question which is not timely—equal protection. In that question, Petitioner fails to recognize the difference between the tax provided for in "An Act in relation to a tax upon persons engaged in the business of selling tangible personal property to purchasers for use or consumption", Illinois Revised Statutes, 1933, Chapter 120, Section 4.41, and the tax involved in this case. The tax imposed upon persons engaged in the business of selling tangible personal property does not provide for the business to

retain a percentage of the tax for cost of collection. The question properly stated should be: Is the Company in effect an agent for the City in collecting the tax from the consumer? The Supreme Court of Illinois decided in the affirmative.

The fourth question posed in the Petition assumes that the Supreme Court of Illinois refused to accept the language of the franchise contract when in fact that Court interpreted that contract not to include in its set-off provision a tax upon the consumer.

STATEMENT

The statement of the case contained in the petition is substantially correct except that it contains no reference to the fact that the Company pursuant to statutory authorization separately adds the amount of the tax imposed by the 1960 ordinance to its bill to the consumer, and deducts three per cent (3%) before remitting it to the city although the Company stated in its verified answer:

> "It admits, that pursuant to law and to all requisite regulatory authority first duly obtained, it has made a charge, within all permissive statutory and regulatory limitations, to customers, in the City of East St. Louis, for the tax imposed upon and paid by it to the City of East St. Louis under the terms and provisions of Ordinance No. 3698."

The Petitioner also fails to point out that the Supreme Court of Illinois elaborated upon its decision that the Utility Tax Ordinance did not impair the obligation of the franchise contract by stating that:

> "Under the tax ordinance the consumers paid the taxes and the Company was but a conduit for the

transmittal of moneys to the City", and that "the Company so far as the franchise contract was concerned remains in the same position it occupied prior to the enactment of the Utility Tax Ordinance." (Petition p A-8)

The Supreme Court of Illinois further stated that, "Where the status quo of the contractual relationship is undisturbed it cannot be plausibly said that there has been any impairment of contract." (Petition p A-8)

The decision of the Supreme Court of Illinois is not contrary to admitted and stipulated facts. The tax was in effect imposed upon the consumer rather than upon the Company.

ARGUMENT

The decision of the Supreme Court of Illinois is a correct application, to the facts and circumstances of the instant case, of the accepted principles of law. There is no dispute that the franchise ordinance No. 3193 is a contract binding upon the City and Company, and there can be no dispute that the Company is permitted to and does pass on the Utility Tax to the consumer and further retains a fee for collecting the tax.

The Utility Tax imposed by the 1960 ordinance is not the type of charge referred to in subparagraph (b) of paragraph B in Section 6 or Ordinance No. 3193. (Petition pp.) A-16-19). The gross income of the Company is not affected by this charge which is actually a tax on the consumer and not a tax on the Company.

Obviously, subparagraph (b) of paragraph B of Section 6 of the 1948 franchise ordinance contemplated "fees, licenses, charges, taxes or other exactions of whatsoever kind or character" paid by the Company. The percentage of gross receipts payable to the City under the franchise ordinance was to be reduced by the amount of those charges paid by the Company—if any.

The tax imposed under Chapter 24, paragraph 8-11-2, Illinois Revised Statutes, 1965 (Petition pp. A-22-26) is not a charge against the Company. It is a charge against the consumer. The Company is authorized to add this amount to its bill and to reimburse itself for the cost of collecting it.

If the Company's contention were sustained, it would make a sheer profit, in excess of the amount contemplated

by the 1948 franchise. That franchise contemplated any tax *paid by the Company* could be deducted from the franchise fee. Clearly, a charge not paid by the Company but collected by the Company from the consumer was not the type included in subparagraph (b), Paragraph B of Section 6 of Ordinance No. 3193. (Petition p. A-13).

Contrary to the statement of the petitioner that the Supreme Court of Illinois rewrote the franchise ordinance, (Petition p. 15) that Court did not alter the terms of the contract, but rather, correctly decided that this was not a tax contemplated by the franchise ordinance because it was not a tax upon the Company.

The Petitioner seeks to compare the utility tax with the Illinois Retailers Occupation Tax of 1933 and cites *Winter* v. *Barrett*, 352 Ill. 441, 186 N.E. 113, wherein the Supreme Court of Illinois ruled that the Retailers Occupation Tax (Petition pp. 17-18) was a tax upon the occupation rather than upon the consumer. On pages 455 and 456 of that opinion the Court states:

> "By Section 2 the tax (Retailers Occupation Tax) is imposed on such persons, and the measure of the tax is fixed at three per cent of the gross cash receipts from the sales of tangible personal property by such persons. Section 3 provides for returns to be made by such persons giving information from which the amount of the tax may be determined. From these provisions it appears that the tax is imposed upon persons engaged in the business mentioned. They are the persons who are required to pay the tax. They are not made the agents of the State or of the Department of Finance to collect the tax from purchasers and pay it over to the department. . . . If prior to April 1, 1933, the selling price of an article was one dollar, and thereafter the seller, taking into consideration the tax in fixing the price

> of the article, charges one dollar and three cents for the same article, he cannot report that the cash received from the sale of the article was one dollar and that the three cents was collected as tax, but in reporting his receipts, he must report the total amount received—that is, one dollar and three cents —and pay a tax three per cent of that amount."

In the instant case, the Company collects the utility tax separately and retains three per cent of that amount for costs incurred. Such was not the case in the Illinois Retailers Occupation Tax of 1933. *Winter* v. *Barrett* as cited above does not relate an effect of the Retailers Occupation Tax upon a particular franchise contract. The question in the case at hand is whether or not the utility tax should be set-off from the franchise tax. The Supreme Court of Illinois correctly held that it should not be.

In *St. Louis* v. *United Railways Co.,* 210 U.S. 266, 28 S. Ct. 630, 52 L.Ed. 1054, the United Railway Company claimed to be exempt from a certain tax by the terms of a contract with St. Louis. The Court in its opinion stated:

> "The principles involved in this case have been the subject of frequent consideration in the Court, and while it can be no longer doubted that a State or municipal corporation, acting under its authority, may deprive itself by contract of the power to exercise a right conferred by law to collect taxes or license fees, at the same time the principal has been established that such deprivation can only follow when the State or City has concluded itself by the use of clear and unequivocal terms. The existence of doubt in the interpretation of the alleged contract is fatal to the claim of exemption."

The Supreme Court of Illinois decided correctly in the present case that the utility tax is in effect a tax on the

consumers and consistent with the rules set forth in the St. Louis case determined that the terms of the franchise contract do not include the utility tax within the set-off provisions.

Obviously there are situations in which contract obligations have been impaired by subsequent legislation. Some of those situations have been cited by the petitioner. But no case cited by the petitioner involves a situation which is remotely similar to the facts and circumstances of the case at hand.

Duluth and Iron Range Railroad v. *County of St. Louis,* 179 U.S. 302, 21 S. Ct. 124, 45 L.Ed. 201, and *Stearne* v. *Minnesota ex rel Mar.,* 179 U.S. 223, 21 S. Ct. 73, 45 L.Ed. 162, cited on page 16 of the petition involve taxes upon a railroad which were not passed on to consumers and from which the Railroads were specifically exempted. The circumstances of those two cases cannot be compared with the circumstances giving rise to the instant case.

The constitutional guaranty of equal protection has not been raised in either the Supreme Court of Illinois or the Circuit Court of St. Clair County, and cannot now be raised in the petition for a Writ of Certiorari. (Petition p. 4) Even if the guaranty were raised at the proper time, there is nothing in this case which could be construed to deny the Company the Constitutional guaranty of equal protection. The Company is not within the same category as sellers of tangible personal property. It is subject to the same tax as are other public utilities. Further, the Company has never raised objection to the constitutionality of the utility tax.

The petitioner has for the first time raised a question as to whether the utility tax has unconstitutionally de-

prived the Company of its property without due process. (Petition p. 3). This issue cannot now be raised for the first time, and, even assuming the issue to be properly raised, it is without merit. The Supreme Court of Illinois did not reject any stipulated and admitted facts by determining that in fact the tax was paid by the consumer. No property of the Company has been taken so that it cannot be said that the Company has been deprived of its property without due process of law.

CONCLUSION

The petition for a Writ of Certiorari raises no questions which deserve consideration. The Supreme Court of Illinois correctly held that the utility tax was in effect a tax upon the consumer and not included within the set-off provision of the franchise ordinance. Respondent respectfully requests that this Court deny the Petitioner's request for the issuance of a Writ of Certiorari to the Supreme Court of Illinois.

Respectfully submitted,

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